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Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 108.

OHIO VALLEY NATIONAL BANK, *Plaintiff in Error*,

vs.

JOHN HULITT, Receiver of the First National Bank of Hillsboro, Ohio, *Defendant in Error*.

BRIEF FOR PLAINTIFF IN ERROR.

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BRIEF FOR PLAINTIFF IN ERROR.

This was an action by the receiver of the insolvent Hillsboro bank, to recover an assessment levied by the Comptroller of the Currency against the shareholders, by virtue of section 5151 of the revised statutes.

The circuit court gave judgment for defendant. The circuit court of appeals reversed with direction to enter judgment for plaintiff.

Defendant, now plaintiff in error, asks for the reversal of the latter judgment and the affirmance of the original judgment in its favor.

STATEMENT.

There was but one issue, to-wit: whether defendant was a shareholder within the meaning of the statute. The case was submitted to the court without the intervention of a jury

and upon an agreed statement of facts. The facts are these:

The shares in question were owned by one Price, registered in his name and by him indorsed in blank and delivered to defendant as collateral to his note. He died leaving his note past due and unpaid. Shortly afterward defendant made a formal transfer of the shares to its clerk Oetjen, who procured new certificates in his own name and thereupon became the registered holder of the shares. The terms and conditions of this transfer are expressed in the stipulation as follows:

"Said transfer was made upon the understanding and agreement between said Oetjen and the defendant, that the former should hold said stock as a security for the indebtedness of the estate of said Price upon said note, applying any amounts which he might realize from said stock as credits upon said note" (p. 8).

The stock remained in this situation nearly two years, during which time certain other collateral, transferred in the same way, was realized upon by Oetjen and the proceeds credited upon the note. Then it became necessary for defendant to file proof of claim against Price's estate, and out of that incident, according to the holding of the circuit court of appeals, defendant's liability as a shareholder arose. The stipulation proceeds at this point as follows:

"Defendant prepared proof of claim against the estate of said Price and at that time, believing the stocks transferred to said Oetjen to afford a reasonable security for said Exhibit A. [the note] to the amount of forty-four hundred and eighty-four ($4,484.00) dollars, endorsed the credit for that amount upon said note which appears upon said Exhibit A. and filed its proof of claim against said estate for the balance of the indebtedness upon said note" (p. 9).

The credit so indorsed was in these words:

"Forty-four hundred and eighty-four ($4,484.00) dollars,

paid on account of within note June 18, '94, being proceeds of sale of 30 shares stock Dominion National Bank and 20 shares of stock 1st National Bank of Hillsboro, O." (p. 10).

This indorsement was made nearly two years after the so-called sale which it recited. No consideration was paid for that credit, nor was it entered on defendant's books. As above stated, the indorsement on the note was merely defendant's way of estimating the value of the security and stating the balance as the amount of its claim as an unsecured creditor.

The agreed statement concludes with these admissions:

"That from the date of said transfer the stock in said bank at all times appeared on the books of said bank in the name of said Oetjen; that there was nothing on the books of said bank at any time to connect this defendant with said stock or to indicate that this defendant had any interest whatever in the same; that defendant at no time performed any act of ownership of said stock, or exercised, or attempted to exercise any of the rights of a stockholder of said bank . . . unless the acts above set forth were, according to legal intendment, of that character.

Defendant caused said shares to be transferred to said Oetjen because it was unwilling to assume the risk of the statutory liabilities of a stockholder in respect to said shares" (p. 9).

This was the status as to these shares when the Hillsboro bank closed its doors. If the Ohio Valley National Bank was at that time a shareholder within the meaning of the statute, the pending judgment must be affirmed, otherwise it must be reversed and the original judgment reinstated.

ARGUMENT.

I.

The transfer to Oetjen did not bring defendant into such relation to the shares as to subject it to the statutory liability.

This seems to be conceded by both courts below and by opposite counsel. Indeed the point is firmly established by the decisions of this court.

"A pledgee of shares of stock in a national bank who in good faith and with no fraudulent intent takes the security for his own benefit in the name of an irresponsible trustee for the avowed purpose of avoiding individual liability as a shareholder, and who exercises none of the powers or rights of a stockholder, incurs no liability as such to creditors of the bank in case of its failure." Anderson, Receiver, vs. Philadelphia Warehouse Co., 111 U. S. 479.

Pauly vs. Trust Co. 165 U. S. 606.
Rankin vs. Fidelity Co. 189 U. S. 242.

The whole claim of the other side arises upon the incident which occurred nearly two years later, when defendant indorsed an arbitrary credit upon the note and made claim against the estate of Price for the balance. Let us look into that incident.

II.

Defendant's relation to these shares was not in any manner affected by its proof of claim against the debtor's estate.

Defendant's indorsement on the note in 1896, referred to the transfer of 1894 as a sale. The parties have stipulated that it was not a sale, but a transfer by way of pledge. The recitals of the indorsement cannot be made use of to impair the force of that stipulation. In other words the parties have stipulated that there was no sale in fact, but that at one time defendant had stated that there was a sale. These are two

independent, coexisting facts, and each must receive its full legal significance in the determination of the case. If so, then any liabilities attaching to defendant because of its erroneous recital of 1896, attached then and there for the first time and because of an estoppel to deny. It is vital that there should be no confusion of ideas on this point. While the attitude of the circuit court of appeals in respect to it is not clearly defined, the point seems to be substantially conceded, thus:

"Granting that, notwithstanding the defendant's representation, there had in fact been no actual sale of the stock, we think the result of the proceedings in the probate court upon the defendant's representation and claim was, as between the Price estate and the defendant, to transfer the ownership of the stock to the defendant, for the consideration represented in the indorsement, and that the defendant could not thereafter claim against the estate that it had not appropriated the stock," etc. (p. 21).

This may be taken to mean that while defendant was not a shareholder from 1894 to 1896, he afterward became a shareholder by estoppel. To this claim of an estoppel defendant replies: (1) that plaintiff can not assert the administrator's personal right of estoppel; (2) that even the administrator could not assert it without showing a change of status induced by the representation, and this was not shown; finally, (3) that the language of the indorsement must determine the measure of the estoppel, and therefore that defendant could only be estopped to deny that Oetjen was the responsible shareholder.

(1). Starting with the admitted premise that defendant was not at any time, before or after the indorsement, a shareholder in fact, who is the party entitled to say: "Nevertheless you shall not deny that you are a shareholder?" Certainly not the receiver of the defunct bank. Defendant made no representations to him, nor to the creditors whom he represents.

"No person can rely upon an estoppel growing out of a transaction to which he was not a party nor privy, and which in no manner touches his rights." Deery vs. Cray, 5 Wall., 795.

"It is necessary to notice who sets up this plea of estoppel. An estoppel in pais does not operate in favor of everybody. It operates only in favor of a person who has been misled to his injury, and he only can set it up." Ketchum vs. Duncan, 96 U. S. 659, 666.

(2). But even the person to whom the representation was made has sustained no injury and could therefore assert no right. How has he been prejudiced? By paying a dividend on part of the note of his intestate, and not upon all of it? To that extent he profited rather than lost by the representation.

It is suggested by the learned judge delivering the opinion now under review, that Price's estate might have claimed some equity in the stock but for this representation. He says:

"It may be that the representative of the Price estate might once have had some remedy to recover the stock, but he has made no claim for relief against the transaction, and it is manifest that he would now have no motive for doing so. The stock is worse than useless" (p. 21).

Thus in one sentence the court suggests that possibly the administrator may have been misled, and in the next, makes it clear that the possible deception worked to his advantage rather than otherwise, in saving him from a stockholder's liability.

But the point may be disposed of by saying that the record is entirely silent as to any prejudice sustained by the administrator. He is not a party to this action and his status is not alluded to in the agreed statement of facts.

(3). But what would be the scope of the estoppel if successfully asserted in this case?

"The measure of the operation of an estoppel is the extent

of the representation made by one party and acted on by the other. The estoppel is cimmensurate with the thing represented, and operates to put the party entitled to its benefit in the same position as if the thing represented were true," 2 Pomeroy Eq. Jur. Sec. 813.

The indorsement represented that in 1894 defendant had made an absolute sale of these shares to one Oetjen, for the sum of $4,484.00 which Oetjen then and there paid, and which defendant then and there credited on the note. If that representation had been true, Oetjen would have been the shareholder and liable to the receiver in this action.

The whole subject of estoppel is so readily disposed of that one is impressed with the thought that the learned reviewing court was unconsciously influenced by a skepticism touching the facts agreed upon by the parties. Accordingly these words in the course of the opinion cause no surprise:

"Whatever the undisclosed motive of the defendant may have been, we think the legal import of what was actually done was that it acquired the stock, and that the estate of Price no longer held it either for the benefits or burdens of ownership. No one could believe that the defendant, when its claim was adjusted in the probate court, expected to make further answer to the estate for this stock, or intended anything else than a conversion of it into its own property at the price for which it reported the stock sold" (p. 21).

To these observations defendant replies:

Defendant's motive was not "undisclosed." The avowed motive of the transfer was to avoid the danger of a stockholder's liability. This was not only defendant's privilege, but its duty to its own stockholders. It adopted the course approved by repeated decisions of this court, some of which are cited above. The avowed motive of the indorsement was to preserve the status created by the transfer, defendant "believing" the stock transferred, to be a "reasonable security" for the amount credited. The stipulation as quoted, absolves

defendant of any intent to convert the stock to its own use, and it is difficult to perceive how the act of clothing a third party with the apparent ownership, would saddle the stock on the defendant in the absence of such intent.

Nor have we here any occasion for the weighing of evidence. The words "no one could believe" have no place in the decision of questions of law. What defendant would or would not have done had Price's administrator sought to redeem this stock in the hands of Oetjen, is not matter for speculation in this case. That might form the basis of an interesting speculation in the mind of the administrator if he contemplated an action. As between the parties to this action every inquiry of fact is concluded by the stipulation. It settles not evidential matter, from which conclusions of fact might be drawn; it determines the ultimate conclusion of fact on each issue in the case. The three broad conclusions of fact upon which the decision must rest are first, that the transfer to Oetjen was by way of security; second, that the subsequent indorsement was made because defendant believed that the stock still afforded "security;" third, that defendant at no time exercised or sought to exercise any act of ownership over the stock unless the foregoing acts were, according to "legal intendment" of that character.

The decision of the intermediate court can only be sustained by arbitrarily expunging from the record one or the other of these three stipulated conclusions of fact.

CONCLUSION.

Where a stockholder seeks by any device to disguise himself for the purpose of escaping this statutory liability, this court has always scrutinized the transaction with a jealous eye; but where a party who has never held that relation, adopts ways and means to protect himself against the danger of apparent ownership, this court has always recognized his

right. Where, as in the case at bar, the party so seeking to protect himself happens to be a national bank, this court declares that there is not merely the right, but the duty of self-protection. It has gone so far as to say that national banks lack corporate power to incur the risks of a speculative enterprise, or partnership liabilities, by taking or holding corporate or syndicate shares, even though taken in satisfaction of a debt, and that estoppel will not lie to bar the defence. I refer of course to the recent cases of

First National Bank vs. Converse, 200 U. S. 425.
Merchants National Bank vs. Wehrmann, 202 U. S. 295.

If a national bank may not by its deliberate, intentional act bring itself into any relation toward shares which would involve it in liabilities of that character, may we not justly conclude that it not only may, but must, in the lawful exercise of its corporate functions, avoid so far as possible the ownership or appearance of ownership of all securities which subject the shareholder to liability of any kind?

If the bank becomes in fact a shareholder, no doubt under the law as it now stands, the liability attaches; though in view of the last two decisions above cited, it may one day be held otherwise. But where the national bank is not in fact a shareholder it may protect itself in any way which would not work a fraud upon the creditors of the other corporation and give rise to an estoppel. Such is the case at bar.

The judgment of the circuit court was right and should be affirmed, and the judgment of reversal should be vacated.

Respectfully submitted,

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